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IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* CONTINUING CARE LEADERSHIP COALITION, INC., HOME CARE ASSOCIATION OF NEW YORK, INC., HOME CARE COUNCIL OF NEW YORK CITY, INC. AND NEW YORK STATE ASSOCIATION OF HEALTH CARE PROVIDERS, INC. IN SUPPORT OF PETITIONERS

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Coke v. Long Island Care at Home, Ltd., 376 F.3d 118 (2d Cir. 2004), *vacated*, 126 S. Ct. 1189, *on remand*, 462 F.3d 48 (2d Cir.), *cert. granted*, 127 S. Ct. 853 (2007)	3-4, 6
Coke v. Long Island Care at Home, Ltd., 462 F.3d 48 (2d Cir.), *cert. granted*, 127 S. Ct. 853 (2007)	4, 7, 17-18
Hanley v. Hand 'N Heart, LLC, Civ. Nos. 4:06cv71, 4:06cv143, 2007 WL 201088 (E.D. Va. Jan. 22, 2007)	7-8
Johnston v. Volunteers of Am., Inc., 213 F.3d 559 (10th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001)	5
NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267 (1974)	10
North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1981)	10
Northwest Ecosys. Alliance v. United States Fish & Wildlife Serv., No. 04-35860, 2007 WL 286581 (9th Cir. Feb. 2, 2007)	8, 9
Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999)	14

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Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)	10
Rust v. Sullivan, 500 U.S. 173 (1991)	17
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	7
Terwilliger v. Home of Hope, Inc., 21 F. Supp. 2d 1294 (N.D. Okla. 1998)	5
United States Telecom Ass'n v. FCC, 400 F.3d 29 (D.C. Cir. 2005)	8
United States v. Mead Corp., 533 U.S. 218 (2001)	7
Welding v. Bios Corp., 353 F.3d 1214 (10th Cir. 2004)	5
FEDERAL STATUTES & REGULATIONS	
29 C.F.R. § 552.109(a)	*passim*
29 U.S.C. § 259	10
Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 5201, 120 Stat. 4, 46-47 (Feb. 8, 2006), amending 42 U.S.C. § 1395fff(b)(3)(B)(ii)(IV)	23
Exec. Order No. 13217, 66 Fed Reg. 33,155 (June 18, 2001)	14
66 Fed. Reg. 5,481 (Jan. 19, 2001)	6
67 Fed. Reg. 16,668 (Apr. 8, 2002)	6, 21
STATE STATUTES & REGULATIONS	
10 N.Y.C.R.R. § 766.2(a)(3)	19
OTHER MATERIALS	
H.R. Rep. No. 93-913 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811	17
118 Cong. Rec. 24,715 (July 20, 1972)	17
Op. Ltr. FLSA2005-12, 2005 WL 2086801 (Mar. 17, 2005)	6

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Congressional Budget Office, Cost Estimate, *S. 1932: Deficit Reduction Act of 2005* (Jan. 26, 2006), *available at* http://www.cbo.gov/ftpdocs/70xx/doc7028/s1932conf.pdf 22

Department of Health & Human Services, *FY 2007 Budget in Brief: Centers for Medicare & Medicaid Services*, *available at* http://www.hhs.gov/budget/07budget/centersformed.html 23

Commission on Health Care Facilities in the 21st Century, *A Plan to Stabilize and Strengthen New York's Health Care System: Final Report* (Dec. 2006), *available at* http://www.ny healthcarecommission.org/docs/final/commissionfinal report.pdf 15

New York State Dep't of Health, Office of Medicaid Management, *Restructuring Long Term Care in New York State*, 21 DOH Medicaid Update 6 (June 2006), *available at* http://www.health.state.ny.us/health_care/medicaid/program/update/2006/jun2006.htm 15

New York State Dep't of Health, *Consumer Guide to Community-Based Long Term Care* (Apr. 2006), *available at* http://www.nyhealth.gov/health_care/medicaid/program/longterm..... 15

New York State Dep't of Health, Most Integrated Setting Coordinating Council (Aug. 2004), *available at* http://www.health.state.ny.us/nysdoh/miscc/index.html 15

New York State Dep't of Health, *New York State Managed Long-Term Care: Final Report* (Mar. 2006), *available at* http://www.health. state.ny.us/health_care/managed_care/mltc/pdf/mltc_final_rep.pdf..... 16

TABLE OF AUTHORITIES—Continued

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BDO Seidman, LLP, *A Report on Shortfalls in Medicaid Funding for Nursing Home Care* (June 2006), *available at* http://ahca.org/brief/seidmanstudy0606.pdf 11

Neil P. Benjamin, Assistant Director, Division of Health Facility Planning, New York State Dep't of Health, Attachment to Memorandum to Members of the Planning Committee and the Codes and Regulations Committee (Jan. 17, 2003) (Ex. A to Brief of *Amicus Curiae* Continuing Care Leadership Coalition, Inc. in Support of Petitioners *in Long Island Care at Home, Ltd. v. Coke*, No. 04-1315 (U.S. Apr. 29, 2005)) 14

Steven L. Dawson & Rick Surpin, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care* (The Aspen Inst. Jan. 2001) 23

Alene Hokenstad *et al.*, *Medicaid Home Care Services in New York City: Service Utilization & Family Involvement* (United Hosp. Fund of N.Y. May 1998) 20

Letter from Dennis Smith, Director, Center for Medicaid and State Operations, Center for Medicare and Medicaid Services, U.S. Dep't of Health & Human Services to State Medicaid Directors (Sept. 17, 2003), *available at* http://www.cms.hhs.gov/smdl/downloads/smd091703.pdf 15

Robyn Stone, *Long Term Care for the Elderly with Disabilities: Current Policy, Emerging Trends, and Implications for the Twenty-First Century* (Milbank Mem'l Fund 2000), *available at* http://www.milbank.org/reports/0008stone 11

TABLE OF AUTHORITIES—Continued

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Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16 Home Health Care Mgmt. & Practice 339 (Aug. 2004), *available at* http://hhc.sagepub.com 23

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INTEREST OF THE *AMICI CURIAE*

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amici curiae* in support of petitioners. The parties have consented to the filing of all briefs by *amici curiae*, and these consents have been filed with the Court.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

The Continuing Care Leadership Coalition ("CCLC") is a not-for-profit membership organization whose members include more than 100 not-for-profit and public organizations providing long term care services in New York State, including mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals.

The Home Care Association of New York State, Inc. ("HCA") is a not-for-profit organization that promotes home care and community services for the citizens of New York State. Most of HCA's nearly 400 provider members are non-profit and government agencies, and they serve the majority of Medicaid and Medicare recipients receiving home care services in New York State.

The Home Care Council of New York City, Inc. ("HCC") is a not-for-profit professional association of home health care providers whose members provide over $1 billion in home care services on an annual basis to more than 70,000 elderly, disabled, and frail New York City residents. Through contracts with the City of New York's Human Resources Administration, 51 of HCC's not-for-profit members provide personal care services to Medicaid-eligible New Yorkers.

The New York State Association of Health Care Providers, Inc. ("HCP") is a not-for-profit industry association of home and community-based health care providers throughout the State of New York. HCP represents approximately 500 offices of licensed home care service agencies, certified home health agencies, long term home health care programs, hospices, and related health care organizations.

All four *amici* submitted briefs to this Court in support of the Petitions for Writs of Certiorari to review the decisions rendered by the United States Court of Appeals for the Second Circuit herein. To avoid burdening the Court with possibly duplicative filings, these four associations of home

health care providers have joined their voices in this brief to present the perspective of their members, the third-party employers who bear the brunt of the Second Circuit's ruling. The continued enforceability of the third-party employer regulation is of critical importance to the members of all four associations and to their ability to continue providing services to a patient population that is largely elderly, indigent, and totally dependent on these services.

SUMMARY OF ARGUMENT

By striking down a regulation that had been in effect for thirty years, the Second Circuit improperly substituted its judgment for that of the agency charged with implementing and administering the regulation. The Court of Appeals' failure to accord the proper level of deference to the administrative agency resulted in a ruling that is already having a profound effect on the provision of home health care services in New York State and, if not reversed, will disrupt the continuity of care and negatively affect the provision of essential services to the elderly, all without improving the financial circumstances of home health workers.

ARGUMENT

I. THE FAILURE OF THE SECOND CIRCUIT TO ACCORD APPROPRIATE DEFERENCE TO AGENCY RULEMAKING HAS JEOPARDIZED THE CONTINUED PROVISION OF VITAL HOME HEALTH SERVICES

A. Judicial Deference To Agency Expertise Has Its Basis In Sound Policy, And Is Particularly Appropriate Here Where The Agency Has Repeatedly Considered The Matter

The Court of Appeals for the Second Circuit twice refused to accord deference with respect to the third-party employer regulation at 29 C.F.R. § 552.109(a): first in its July 2004

decision (Pet. App. 7a-32a), reported at 376 F.3d 118 ("*Coke I*"), and then in its opinion on remand from this Court (Pet. App. 1a-6a), reported at 462 F.3d 48 ("*Coke II*"). Despite this Court's direction that it consider an extensive Department of Labor ("DOL") memorandum addressing in detail application of the companionship exemption of Section 13(a)(15) of the Fair Labor Standards Act ("FLSA") to third-party employers,[2] the Second Circuit on remand persisted in denying the agency any deference at all, preferring its own reasoning to that of the agency. *See* Pet. App. 6a ("After reconsidering our 2004 decision in light of the DOL Memo, we find no reason to abandon the reasoning or the results reached in that decision"). That opinion flouted this Court's precedents, which have repeatedly recognized the agency's primacy on matters of policy and the interpretation of its own regulations, especially where the agency's actions have been left undisturbed by Congress for decades and where Congress has expressed no contrary intent on the matter.

Amici respectfully submit that the Second Circuit's improper substitution of its judgment for that of the agency charged by Congress with the promulgation of the regulation at issue has created the very result that sound principles of administrative law are intended to avoid. As recognized by every other court to consider (and uphold) this same regulation, including the Tenth Circuit, the regulation is based on policy concerns that are well within DOL's purview. And as *amici* will explain further in this brief, the Second Circuit's refusal to abide by these principles, even after remand from this Court, threatens a host of harmful and unnecessary consequences.

The proper application of sound deference principles is in fact illustrated in this very case, in the opinion of the District

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[2] *See* Department of Labor, Wage & Hour Advisory Memorandum, December 1, 2005 (the "DOL Memo") (Pet. App. 50a-64a).

Court.[3] In its opinion, the District Court described the "strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years. . . ." Pet. App. 46a. With respect to the level of deference owed to the DOL, the District Court explained:

> The DOL's interpretation of Section 213(a)(15) in 1975 is evidence that it believed the regulations were proper at the time the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments [in 2002] shows that it still believes that these long-standing regulations are appropriate in the current home health-care environment. Despite amending Section 213(a)(15) seven times since [1974], Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit Congressional mandate.

Pet. App. 47a.

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[3] The District Court reviewed as well the decisions of the courts that had previously considered the regulation, including the Tenth Circuit, which has twice upheld the regulation. In *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559, 562 (10th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001), the Tenth Circuit held that 29 C.F.R. § 552.109(a) is entitled to *Chevron* deference; the Court has since adhered to this holding in *Welding v. Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004). Another decision analyzed by the District Court herein was rendered by a district court in Oklahoma, which, in rejecting a similar attempt to terminate third-party employers' eligibility for the exemption, noted that "[p]laintiff has identified no authority, and the Court is unable to locate any, that supports this view of the companionship services exemption. In fact, the Court is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294, 1299 n.2 (N.D. Okla. 1998).

As the District Court pointed out, DOL had on at least two occasions subjected the regulation at issue to intense scrutiny, once upon its promulgation and again when consideration was given to its possible amendment. When DOL withdrew proposed amendments of Section 552.109(a) in April 2002, it did so because "'numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into question the Department's conclusion that there would be little economic impact.'" Pet. App. 42a-43a (citation omitted). DOL terminated the proposal, thereby choosing to leave the regulation in the form first adopted in 1974 and abandoning the proposed amendments published on January 19, 2001. *See* 66 Fed. Reg. 5,481 (Jan. 19, 2001). DOL made this determination in the exercise of its expertise and on the basis of the "rulemaking record as a whole." 67 Fed. Reg. 16,668 (Apr. 8, 2002).

Since the time of the District Court opinion, DOL has had occasion to focus on the regulation three more times, once when it appeared before the Second Circuit to argue the *Coke I* case, again in March 2005 when it issued an opinion letter indicating that the Wage & Hour Division has not changed the regulation or its interpretation thereof as a result of *Coke I* (*see* Op. Ltr. FLSA2005-12, 2005 WL 2086801 (Mar. 17, 2005)), and finally in December 2005 when it issued the DOL Memo. Each time, its conclusion has been the same: 29 C.F.R. § 552.109(a) is a valid and enforceable regulation, properly promulgated by DOL pursuant to its expressly conferred legislative rulemaking authority. For the Second Circuit to strike this regulation down in a "test case" that had not yet proceeded beyond the pleading stage (Pet. App. 9a-10a), not only flies in the face of established precedent, but also illustrates why judicial deference to agency expertise is appropriate.

Agencies have expertise in their fields that judges and legislators do not necessarily possess, and are generally in the

best position to determine how a proposed rule will affect the industry and the public. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). *Chevron* explains that when Congress has not directly addressed the precise question at issue and has delegated authority to an agency to clarify a specific statutory provision, the agency's regulation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 843-44. This Court noted that it has consistently deferred to such administrative interpretations "'whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'" *Id.* at 844 (citations omitted). Given that the Second Circuit admitted on remand (Pet. App. 4a-5a) that a clear congressional intent on the matter could not be inferred, the agency's regulation warrants deference. Nor does the fact that DOL has considered alternatives undermine that deference, since, as *Chevron* further notes, "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. at 863-64.

The Second Circuit's decision is also remarkable for its failure to grant even the lesser deference owed under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), where this Court likewise recognized that an agency's policies are based on expertise in the field. *Id.* at 139 ("But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"); *see also United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) ("There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case . . ."); *Hanley v.*

Hand 'N Heart, LLC, Civ. Nos. 4:06cv71, 4:06cv143, 2007 WL 201088, at *13 (E.D. Va. Jan. 22, 2007) (because the court determined that the DOL's third-party employer regulation "is valid and enforceable under the *Skidmore* standard of deference . . . it was unnecessary for the Court to determine whether § 552.109(a) is a legislative or interpretive regulation") (citations omitted). In this particular instance, the Second Circuit could not know what the DOL learned from the notice-and-comment proceedings, that is, the enormous impact that the invalidation of Section 552.109(a) would have on the home health care industry.

Rather than considering DOL's extensive analysis of the legal authority and binding nature of—as well as its sound policy basis for—the regulation, the Second Circuit relied on a formalistic notion that the agency's labeling of the regulation should control,[4] giving short shrift to the fact that this

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[4] The Second Circuit in *Coke I* and *Coke II* relied principally on the placement of the regulation in a subpart entitled "Interpretations" for its theory that DOL did not intend to create a binding regulation when it promulgated 29 C.F.R. § 552.109(a). Such formalism does not, and should not, control whether or not a regulation is enforceable or subject to deference. *See Auer v. Robbins*, 519 U.S. 452, 462-63 (1997); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("[T]he framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation"). The Second Circuit offered no support for its assertion that the agency's label should control, and sound precedent is to the contrary. *See, e.g., United States Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) (agency's label of rule as interpretive does not govern whether notice and comment is required); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (same). Nor did the Second Circuit explain why, even if it were correct that DOL's use of notice and comment procedures here was "voluntary," that should deprive the rule of *Chevron* deference. Again, sound precedent is to the contrary. *See, e.g., Northwest Ecosys. Alliance v. United States Fish & Wildlife Serv.*, No. 04-35860, 2007 WL 286581, at *5 (9th Cir. Feb. 2, 2007) (expressly rejecting the contention that an agency rule issued after notice and comment rulemaking should be denied *Chevron* deference simply because the agency chose to label it a "policy statement" rather than a rule).

regulation was intended to, and did, have the force of law for more than thirty years. Home health workers, their union representatives, and home health providers have all treated the regulations as law, and governed their affairs accordingly. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (a legislative regulation is "one 'affecting individual rights and obligations'") (citation omitted); *Northwest Ecosys. Alliance*, 2007 WL 286581, at *5 ("The Alliance has presented no evidence that the DPS Policy has ever been treated (by the Service or parties presenting petitions to list species) as anything other than legally binding. We therefore hold that the DPS Policy is entitled to *Chevron* deference"). Indeed, the very longevity of a regulation has repeatedly been treated by this Court as commanding "substantial deference" even where *Chevron* does not apply. *See, e.g., Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 487 (2004).

By adhering to its original decision and improperly substituting its own judgment for that of the administrative agency charged with implementing and administering the statute in question, the Second Circuit has, as discussed in the remainder of this brief, created far-reaching consequences that it did not anticipate. This itself points up the reason for judicial deference to agency expertise. The decision of the Second Circuit, while no doubt made with the best of intentions, will have a substantial negative effect on: (i) home health providers that have relied on the DOL's regulations for the past thirty years; (ii) those in need of companionship services; and (iii) the home health workers the Court sought to benefit.

B. The Invalidation Of The Third-Party Employer Exemption Severely Undermines New York's Health Care System

This Court has frequently noted that long-standing agency interpretations are to be afforded particular deference when being reviewed by a court. *Barnhart v. Walton*, 535 U.S.

212, 219-20 (2002); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1981); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 (1969). This rule recognizes both the expertise of agencies charged with the administration of a statute and the importance of consistency in and reliance on such interpretations. *See Red Lion Broad.*, 395 U.S. at 381-82 (citing "the venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" and "[t]hirty years of consistent administrative construction" in upholding the FCC fair coverage requirement). The reliance on agency interpretations is an integral part of the administration of the FLSA, and in fact employers from whom unpaid wages are sought are provided a complete defense in such actions when they can demonstrate they acted in good faith reliance on and in compliance with an existing agency interpretation. 29 U.S.C. § 259. In the home health care setting, such reliance is of particular importance, as employers are contending with limited financial resources and attempting to maintain continuity in the care they provide to their patients—patients who often would be unable to maintain their independence without home health care.

For over thirty years, home health care agencies and their employees providing companionship services have understood that the FLSA did not require payment of an overtime premium. Thus, the DOL regulation was a clear and unequivocal fixing of private rights. *See Chrysler*, 441 U.S. at 302. Not surprisingly, despite the stay of the mandate that the Second Circuit has granted with respect to both decisions, *Coke I* and *Coke II* have caused disruption throughout the industry as providers have sought to minimize their impact if upheld. The Second Circuit's invalidation of the third-party employer exemption has directly increased expenses for financially fragile home health care agencies and is beginning

to affect other components of the health care system that rely on home health care services.

1. *Impact On The Long Term Care System*

Home health care agencies are an essential part of the long term care system, which provides a vital service to patients and families by caring for New York's older and disabled population. This system consists of various components that address the many levels of need found in this population, including skilled nursing care, home health care, coordinated chronic care, subacute care, and adult day health care. Certain organizations also provide long term care for a variety of specialty populations beyond the frail elderly that include children, people with HIV/AIDS, people with Alzheimer's Disease or dementias, the young disabled, people with traumatic brain injury, people with Huntington's disease, and the visually or hearing impaired.

Home health care agencies in New York and throughout the nation rely heavily on governmental payments that typically do not fully cover current operating costs. This contributes significantly to the fact that a substantial proportion of these providers are financially at risk.[5] Based upon the CCLC's analysis of 2004 audited financial statements for home health care agencies, nearly half (55 or 48%) of 115 certified home health care agencies and more than half (64 or 63%) of 102 long term home health care agencies in New York State are losing money. Additionally, more than half (51%) of New York State's nursing facilities, many of which sponsor home health care programs, are losing money.

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[5] Robyn Stone, *Long Term Care for the Elderly with Disabilities: Current Policy, Emerging Trends, and Implications for the Twenty-First Century* (Milbank Mem'l Fund 2000), *available at* http://www.milbank.org/reports/0008stone; *see also* BDO Seidman, LLP, *A Report on Shortfalls in Medicaid Funding for Nursing Home Care* (June 2006), *available at* http://ahca.org/brief/seidmanstudy0606.pdf.

Over the past decade, New York has cut Medicaid home care funding by an estimated $1 billion. Already the State and local administrators of the Medicaid program have had to cut back on coverage of home care services, often reducing the hours of service for which the Medicaid program will provide reimbursement. After the initial Second Circuit decision was issued in July 2004, the effort to reduce possible overtime liability led to further efforts to reduce service hours, and unless the Second Circuit decision on remand is reversed, the outlook for continued service to Medicaid-eligible patients cared for by *amici* member agencies is bleak indeed. The City of New York has most recently estimated that the Second Circuit's decision will increase the cost of its personal care program (a network of home health care agencies providing care to Medicaid recipients) by approximately $250-280 million annually. *See* Brief of *Amici Curiae* City of New York and New York State Association of Counties in Support of Petitioners, dated February 8, 2007, at 23.

If the State and local governments cannot obtain the additional Medicaid funding needed to pay provider agencies, they will face at best cash flow difficulties, and at worst, insolvency. Many home health agencies are small community-based not-for-profit organizations that operate virtually at cost; such entities will not be able to survive while State and local governments seek additional funding for their programs. The providers can seek to minimize the impact of the Second Circuit decision by reducing overtime hours, but such efforts cannot eliminate the financial impact of the decision and could lead to other unfortunate effects. Unable to afford costs that are not covered by government reimbursement, agencies are forced to decrease the amount of hours worked by home health care aides in order to remain in business and experience increased costs for the additional nurse supervision needed to oversee a greater number of aides working fewer hours. Agencies have also experienced increased costs related

to training additional numbers of home health care aides to meet patient care needs.

The decision is also obstructing the flow of health care delivery between hospitals and home health care agencies. Home health care services are an essential part of the continuum of care for patients who receive both long term and acute care services. Hospitals rely on home health agencies to receive patients that can be discharged home, rather than having patients linger in the hospital for longer than necessary. Home health care agencies are receiving complaints from hospitals on behalf of patients who are seeking long-hour home health care services about the hospitals' inability to find placement for them. The decision is thus not only creating difficulties in the continuity of care provided by home health agencies and in some instances threatening their continued existence, but could impair the ability of hospitals to discharge patients to more appropriate home and community-based settings in a timely manner. This could increase the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's analysis of 2002 financial statements from hospitals, CCLC estimates that if there were a one day increase in the length of stay for patients in New York hospitals who are discharged to home health care agencies, it would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, such increased costs would burden hospitals, the State, local governments, the federal government, and the workers' compensation system.

2. *Impact On Long Term Care Reform*

The decision below will also undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a

core element of its long term care system, New York has maintained a commitment to offering long term care services in the least restrictive setting, which it has done by supporting and encouraging the delivery of care in home and community-based settings. New York's commitment to home care is consistent with this Court's decision in *Olmstead*,[6] which found that state and public agencies must make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The varied mix of home and community-based programs available to older and disabled people has helped over 121,000 older New Yorkers continue to live in the community with the needed supports.[7]

In fact, federal and State agencies have supported programs pursuant to *Olmstead* to help patients, families and other informal caregivers take care of loved ones at home and lead more normal lives. President George W. Bush announced the New Freedom Initiative on February 1, 2003, which is aimed to encourage home and community-based care for older and disabled persons and establish grants to help States implement their plans pursuant to *Olmstead*.[8] On August 17, 2004, the U.S. Department of Health and Human Services, Center for Medicare and Medicaid Services, reconfirmed its commitment to supporting *Olmstead* through the Money Follows the

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[6] *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

[7] *See* Neil P. Benjamin, Assistant Director, Division of Health Facility Planning, New York State Dep't of Health, Attachment to Memorandum to Members of the Planning Committee and the Codes and Regulations Committee (Jan. 17, 2003) (submitted to consider use of home and community services in the development of a revised methodology to update the nursing home utilization data) (Ex. A to Brief of *Amicus Curiae* Continuing Care Leadership Coalition, Inc. in Support of Petitioners *in Long Island Care at Home, Ltd. v. Coke*, No. 04-1315 (U.S. Apr. 29, 2005)).

[8] Exec. Order No. 13217, 66 Fed Reg. 33,155 (June 18, 2001).

Person program, which emphasizes the need for a solid long term care system featuring home and community-based care.[9] In 2004, New York State created the Most Integrated Setting Coordinating Council guided by the principles set forth under the *Olmstead* decision to empower older and disabled individuals to live more independently in the community.[10] Insofar as the Second Circuit's decision will undermine and destabilize the home care infrastructure in New York, the decision is inconsistent with and detrimental to these state and federal efforts to promote and expand home and community based services.

In addition, the decision below and the resulting inevitable increase in costs for home health agencies will damage the progress the State has made in piloting innovative ways to help older and disabled individuals remain in the community[11] and its efforts to reform the long term care system for the future.[12] Together with various home and community-

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[9] Letter from Dennis Smith, Director, Center for Medicaid and State Operations, Center for Medicare and Medicaid Services, U.S. Dep't of Health & Human Services to State Medicaid Directors (Sept. 17, 2003) (submitted to State Medicaid Directors updating States on CMS' commitment to principles under *Olmstead*), *available at* http://www.cms.hhs.gov/smdl/downloads/smd091703.pdf.

[10] New York State Dep't of Health, Most Integrated Setting Coordinating Council (Aug. 2004), *available at* http://www.health.state.ny.us/nysdoh/miscc/index.html.

[11] New York State Dep't of Health, *Consumer Guide to Community-Based Long Term Care* (Apr. 2006), *available at* http://www.nyhealth.gov/health_care/medicaid/program/longterm.

[12] New York State Dep't of Health, Office of Medicaid Management, *Restructuring Long Term Care in New York State*, 21 DOH Medicaid Update 6 (June 2006), *available at* http://www.health.state.ny.us/health_care/medicaid/program/update/2006/jun2006.htm; *see also* Commission on Health Care Facilities in the 21st Century, *A Plan to Stabilize and Strengthen New York's Health Care System: Final Report* (Dec. 2006), *available at* http://www.nyhealthcarecommission.org/docs/final/commissionfinalreport.pdf.

based long term care options in New York, including New York's unique managed long term care program, New York relies on home care to complete its vision for the future of long term care in New York State.[13] In addition, the Court of Appeals decision will disrupt other components of the long term care system that allow individuals to remain in the community and that rely on home health care services, such as adult day health care, long term home health care (also known as the "nursing home without walls" program), and senior housing.

C. The Second Circuit Decision Will Reduce Access To Home Care Services For The Elderly And Infirm In Contravention Of Congressional Intent

When Congress acted in 1974 to exempt employees providing companionship services to the elderly or infirm in their homes from the wage and overtime provisions of the FLSA, it forthrightly stated that its purpose was to help ensure that such individuals could afford to obtain such services. The third-party employer regulation is entirely consistent with this legislative purpose, and invalidation of that regulation would have precisely the impact Congress sought to avoid: it would reduce access to and quality of home care services for the elderly and infirm.

1. *The Third-Party Employer Regulation Is Entitled To Deference Because It Is Not Contrary To The FLSA Or Its Legislative History*

As set forth more fully above, under the *Chevron* doctrine the reconciliation of conflicting policies and implementation

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[13] New York State Dep't of Health, *New York State Managed Long-Term Care: Final Report* (Mar. 2006), *available at* http://www.health.state.ny.us/health_care/managed_care/mltc/pdf/mltc_final_rep.pdf.

requiring special expertise is the province of agencies, not courts. *See* Point A *supra* (*citing Chevron*, 467 U.S. at 843-44); *see also Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (agency construction of a statute may not be disturbed "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent").

The third-party employer regulation warrants deference, because it constitutes the Department of Labor's reasonable accommodation of multiple policy goals. The regulation does not conflict with either the language of the statute or with the Congressional intent underpinning the legislation. To the contrary, the legislative history confirms that the agency's policy choice was consistent with Congress' intent. Congress explicitly stated its intention to exclude individuals providing companionship services from FLSA coverage (H.R. Rep. No. 93-913 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811, 2845), because of Congressional concerns that compliance with the FLSA requirements would "increase tremendously the cost of taking care of our older people, perhaps forc[ing] into nursing homes some of them who otherwise could be taken care of perfectly well in their own homes." 118 Cong. Rec. 24,715 (July 20, 1972) (comments of Sen. Taft).

The District Court herein recognized that the exemption implements the Congressional purpose "to allow those in need of such services to be able to find such assistance at a price they can afford," and that this objective is achieved whether the service is provided by the direct hiring of an employee or through the use of an agency. *See* Pet. App. 46a-47a. Critically, even the Second Circuit acknowledged that "the FLSA has multiple purposes"—including, notably, a desire to exempt companionship services from coverage and to ensure that companionship services "remain affordable for working families"—and that the "third-party employer regulation as currently written would be consistent with some of

these purposes and inconsistent with others." Pet. App. 5a. Despite this acknowledgement that "congressional intent therefore does not lead to any definitive conclusion regarding the enforceability of 552.109(a)," however, the Second Circuit refused to defer to the agency to reconcile the tensions between the multiple policy goals of the statute. Pet. App. 5a. Instead, that court made its own choice regarding which of these policy goals should prevail. This was a clear violation of the principles set forth in *Chevron*. The Second Circuit had neither the authority nor the expertise to supplant the choice of the agency, and its error will result in significant injury to the elderly and infirm who Congress meant to shield from harm.

2. *Invalidation Of The Third-Party Employer Regulation Would Harm Those Needing Companionship Services, Who Congress Sought To Protect*

Invalidation of the third-party employer regulation would reduce the availability of companionship services for those who need them, harm patients' ability to obtain continuity of care, and hurt those elderly or infirm individuals who are not capable of acting as direct employers. Each of these effects directly contradicts the Congressional purpose underpinning the companionship exemption.

As set forth above, invalidation of the third-party employer regulation would cause a damaging disruption in the ability of the home care industry to provide services. That disruption would have a direct and dramatic impact on people who require those services, causing the greatest harm to the patients who are most in need: those whose medical needs demand extensive hours of care and who are unable to afford additional costs. Countless patients could face gaps in coverage. Pet. App. 86a ¶ 9; Pet. App. 105a-106a ¶ 8. In some cases, the inability to obtain adequate and affordable care at home would

force individuals to seek care in nursing homes (Pet. App. 105a-106a ¶ 8), a result absolutely at odds with Congress' intent in creating the FLSA's companionship exemption.

In addition, elimination of the exemption could have a powerful negative impact on the continuity of care available to home care patients. Continuity of care—that is, the provision of services consistently by the same caregivers to the same patients—is so widely recognized to affect the quality of patient care that New York State regulation requires home care agencies to ensure continuity of care to the extent possible. 10 N.Y.C.R.R. § 766.2(a)(3). Elimination of the exemption would force home health care agencies to decrease or eliminate overtime hours to avoid overtime costs that are not covered by government reimbursements. Affidavit of Phyllis Wang, sworn to January 15, 2005 (annexed to the Motion for a Stay of the Mandate to the U.S. Court of Appeals for the Second Circuit, submitted by Long Island Care at Home, Ltd. and Maryann Osborne, dated January 17, 2005) ("Wang Aff.") ¶ 18; Pet. App. 85a ¶ 6; Pet. App. 105a-106a ¶ 8. As a result, the agencies could be compelled either to eliminate any hours of service not required by law or to assign more caregivers—each working fewer hours—to service a single patient. Wang Aff. ¶ 25; Pet. App. 85a ¶ 7; Pet. App. 105a-106a ¶ 8. Many agencies report that they would no longer be able to limit the number of aides assigned to a case or accommodate client requests for the same aides; that is, aides whom the clients have come to know and who are, by experience, knowledgeable about the clients' care needs. Wang Aff. ¶ 25; Pet. App. 85a-86a ¶ 8; Pet. App. 100a ¶ 22.

An increase in the number of caregivers could have a significant deleterious effect on home care clients, who benefit from both the personal comfort and increased quality of service afforded by having only one or two regular care providers. Pet. App. 85a-86a ¶ 8; Pet. App. 99a ¶ 19. Those patients suffering from cognitive impairments, such as Alz-

heimer's Disease and other forms of dementia, generally receive full time care and experience particular benefit from close interaction with familiar caregivers. *See* Pet. App. 85a-86a ¶ 8. These individuals represent a significant portion of those in need of home care services. For example, in New York City, more than half of Medicaid home care recipients have some degree of cognitive impairment, and thirty percent have moderate to severe cognitive impairment.[14] Changing from a single familiar attendant on duty for twelve hours to multiple short shifts of attendants is a disruption of routine that can be disturbing for such patients. *See* Pet. App. 85a-86a ¶ 8. Congress intended for these patients to be able to obtain affordable care in their homes, if at all possible.

The option left to home care patients and their families upon elimination of the third-party employer exemption would be to act as the direct employer of home care workers. For many, perhaps most, this is no option at all. Many individuals are not physically or mentally able to engage in all the activities required to employ individuals directly to provide companionship services, including finding caregivers, confirming their qualifications, screening out those with criminal backgrounds, negotiating wages, arranging for payment of wages, handling the required tax and other regulatory paperwork, and making sure that shifts are covered when a companion is sick or otherwise unavailable. These burdens, together with the complexities of adhering to the requirements of government reimbursement programs in order to obtain funding for the services, eliminate direct employment as a viable or desirable possibility for most patients and their families.

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[14] Alene Hokenstad *et al.*, *Medicaid Home Care Services in New York City: Service Utilization & Family Involvement* 12 (United Hosp. Fund of N.Y. May 1998).

In sum, the impact on home care patients that would result from elimination of the third-party employer exemption would be negative and severe—and directly contrary to the plainly expressed intent of Congress. The Department of Labor accounted for these effects when it originally promulgated the regulation, and again when it decided to retain the regulation as recently as 2002 after consideration of its possible withdrawal. *See* 67 Fed. Reg. 16,668. The judiciary should defer to that well-considered policy choice.

D. Because Of Constraints On Government Reimbursements And Provider Resources The Second Circuit's Ruling Threatens To Adversely Impact Home Care Workers Themselves

Amici fully recognize the importance of making home care companionship employment sufficiently attractive and remunerative to attract dedicated workers to meet the growing demand for these services. However, due to significant constraints within the system, the Second Circuit's ruling is likely to undermine this goal. Again, because the Second Circuit had no record before it,[15] and did not make reference to either of the two separate rulemaking records compiled by the agency, that court did not find, and could not have found, that its ruling would actually increase overall compensation to home health care workers.

As noted in the Petition for Certiorari at 15, and further elaborated on above, home care providers will be unable to bear the cost of overtime compensation. Many providers will thus have no choice but to significantly curtail their employees' work hours in order to avoid incurring ruinous time-and-a-half overtime obligations. *See* Pet. App. 105a-106a ¶ 8.

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[15] *See* Pet. App. 34a (record at pleadings stage provided "little factual background").

This would not only cause severe disruptions for clients needing care, as outlined in the previous section, but threatens harm to health care workers themselves, who will end up with less income, not more. The Second Circuit's ruling is thus likely to have consequences that court may not have intended or foreseen, demonstrating again the hazards that result when a court improperly treads on ground better left to the agency under established deference principles.

Addressing this issue in its opposition to the Petition, Respondent emphasized that provision of home health care services is "heavily subsidized by federal and state government." Respondent's Brief in Opposition, dated December 15, 2006, at 4, 6-7. This is no answer, however. As noted above, providers' reliance on government reimbursement through Medicaid and Medicare is not the solution, since governmental payments typically do not fully cover current operating costs. There is no reason to think that the governmental agencies that administer these programs locally will suddenly find the funds to pay for overtime compensation rather than demand that the providers hire more workers at straight-time rates.

Medicare and Medicaid budgets are subject to very significant constraints that will not ameliorate in the short or medium term and are extremely unlikely to ameliorate in the long term. The Deficit Reduction Act of 2005, Pub L. No. 109-171, states a goal of reducing federal Medicaid spending by $6.9 billion over a five-year period and $28.3 billion over a ten-year period.[16] Federal law provided a zero percent in-

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[16] *See* Congressional Budget Office, Cost Estimate, *S. 1932: Deficit Reduction Act of 2005* (Jan. 26, 2006), at 35 (describing "Subtitle A—Medicaid" of the Act as follows: "Enacting subtitle A would reduce direct spending by $6.9 billion over the 2006-2010 period and by $28.3 billion over the 2006-2015 period"), *available at* http://www.cbo.gov/ftpdocs/70xx/doc7028/s1932conf.pdf.

flation increase in Medicare payments for fiscal year 2006,[17] and the Administration's proposed 2007 budget would freeze Medicare payments for another year.[18]

Removing the minimum wage and overtime exemption of Section 552.109(a) will raise compensation for home care workers only if there is, in fact, additional money to pay increased overtime expenses. Since third-party payers, most notably Medicare and Medicaid, have significant control over vendors' ability to set worker compensation,[19] providers would be largely dependent on government reimbursements to fund any increased overtime payments. Rates are also subject to overall state budget processes, and providers are subject to considerable uncertainty regarding their year-to-year funding.

The unavailability and uncertainty of funding makes it quite likely that providers would have to curtail work hours to avoid costly overtime payments. Workers would thus not have the opportunity either to earn overtime pay or to work longer hours for additional straight-time compensation. *See* Pet. App. 105a-106a ¶¶ 6-8. Alternatively, workers would

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[17] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 5201, 120 Stat. 4, 46-47 (Feb. 8, 2006), amending 42 U.S.C. § 1395fff(b)(3)(B)(ii)(IV).

[18] *See* Department of Health & Human Services, *FY 2007 Budget in Brief: Centers for Medicare & Medicaid Services*, at 9 ("Specifically, based on the most recent recommendations from the Medicare Payment Advisory Commission (MedPAC) for 2007, the Budget proposes a zero percent payment update for skilled nursing facilities, home health agencies, and inpatient rehabilitation facilities, and an update of the market basket minus 0.45 percent for hospitals"), *available at* http://www.hhs.gov/budget/07budget/centersformed.html.

[19] *See, e.g.*, Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16 Home Health Care Mgmt. & Practice 339, 342-43 (Aug. 2004), *available at* http://hhc.sagepub.com; Steven L. Dawson & Rick Surpin, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care* 18-21 (The Aspen Inst. Jan. 2001).

have to work for multiple providers to obtain the extra hours they could not obtain from one provider. The resulting limitation on workers' ability to earn compensation could increase employee attrition and heighten existing staffing shortages. Pet. App. 106a ¶ 9.

In short, unless the Second Circuit decision herein is reversed and the exemption restored, the sudden increase in costs to the home health system will pose grave difficulties to Medicaid-funded home health care and ultimately to other Medicaid-funded services as well. Longer stays in hospitals and increased admissions to nursing homes for Medicaid-eligible patients mean a funneling of patients to more expensive forms of care. Patients will suffer loss of their independence. Moreover, the lot of home health workers will not be appreciably improved. Without money to pay for overtime, employers will have to reduce shifts to avoid overtime. Benefits previously granted to home care workers in collective bargaining agreements may have to be curtailed, as these agreements were premised on the understanding that FLSA requirements do not apply.

CONCLUSION

For all of the foregoing reasons, and those stated in the brief of Petitioners, we respectfully request that this Honorable Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

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